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In The

Supreme Court of the United States

October Term, 1989

THE JIMMY SWAGGART MINISTRIES,

Appellant,

v.

BOARD OF EQUALIZATION OF CALIFORNIA,

Appellee.

On Appeal From The Court Of Appeal, State Of California, Fourth Appellate District, Division One

BRIEF OF NATIONAL COUNCIL OF CHURCHES OF CHRIST IN THE U.S.A. AS AMICUS CURIAE IN SUPPORT OF APPELLANT

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INTEREST OF THE AMICI CURIAE

The National Council of Churches of Christ in the U.S.A. is a community of communions composed of thirty-two national religious bodies having over forty million constituents in the United States. It is commonly known as the National Council of Churches. Its public positions are based on policies adopted by its Governing Board, composed of about two hundred fifty members selected by the member denominations in proportion to their size and support of the Council. The Governing

Board has adopted several policy statements affirming and defining religious liberty.

The positions taken in this brief implement the Council's long-standing position on taxation of religious activities. The Council has long supported the federal tax on unrelated business income and similar taxes at the state level. But the Council has insisted that government cannot tax the essential religious functions of churches.

In this case, California has taxed the dissemination of religious messages. This tax is a tax on the exercise of religion. It is a serious threat to the religious functions of the Council and all its member churches. Thus, the Council is interested in this case because of the direct threat to the religious liberty of its own members, and because of its commitment to religious liberty for all.

SUMMARY OF ARGUMENT

The state can tax religiously affiliated commercial enterprises, but it cannot tax the exercise of religion. The tax in this case is a tax on the dissemination of religious messages, and thus a forbidden tax on the exercise of religion.

This case is indistinguishable from *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), and the tax at issue here is actually more burdensome than the tax in *Murdock*.

Tax immunity here is wholly consistent with *Texas Monthly, Inc. v. Bullock*, 109 S. Ct. 890 (1989), where a tax exemption was struck down because of content discrimination. But a majority in that case recognized that the

Constitution requires some kind of tax immunity for religious exercise.

Tax immunity here is also wholly consistent with *Hernandez v. Commissioner*, 57 U.S.L.W. 4593 (June 5, 1989), where the Court refused to allow a payment for religious services as a deduction against tax on secular income.

Tax immunity in this case would not violate the establishment clause. The state does not establish religion by leaving it alone. Tax immunity for religion is more neutral than taxation of religion, and the establishment clause requires only that the immunity be neutral with respect to all views about religion.

ARGUMENT

I. The Government Cannot Tax the Not-for-Profit Dissemination of Religious Messages.

A. The Key Distinction Is Between a Tax on the Exercise of Religion and a Tax on Religiously Affiliated Commercial Enterprises.

The Council has never contended that all activities conducted by churches are exempt from tax. Twenty years ago, the Council urged Congress to subject churches to the tax on unrelated business income, and we adhere to that position today.

It is equally clear that government cannot tax the exercise of religion. A tax on prayers or sermons would obviously be unconstitutional. This Court has held that a

tax on proselytizing is unconstitutional. *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Follett v. McCormick*, 321 U.S. 573 (1944). This case is about the long-standing distinction between religious exercise, which cannot be taxed, and religiously affiliated commercial enterprises, which can be taxed.

B. This Case Is Controlled by Murdock v. Pennsylvania.

The tax in this case plainly invades the constitutionally protected tax immunity. This is a tax on proselytizing, differing from *Murdock* only in detail. The tax here falls directly on the dissemination of indisputably religious messages. The practical effect is that the state taxes the distribution of religious books and audio recordings.

The tax here is facially neutral, but so was the tax in *Murdock*. 319 U.S. at 115. The religious messages here are sold to those who can afford to pay, but that was also true in *Murdock*. For the reasons so eloquently stated in *Murdock*, a charge for the cost of dissemination does not make dissemination of religious faith a taxable event. *Id.* at 111.

The court below refused to follow *Murdock*. It argued that the tax in *Murdock* was a privilege tax in a flat amount, while the tax here is a sales and use tax computed on the value of the book or the sum contributed for it.

This distinction in how the tax is calculated is irrelevant to the reasons for the constitutional immunity. The essential fact is that the tax falls on the distribution of

religious literature, and not on some commercial enterprise unrelated to core religious functions. Here as in *Murdock*, if the churches would refrain from any effort to recoup the cost of distributing religious literature, they would not owe the tax. Indeed, because of the interstate jurisdiction problems here, appellant Ministries would owe no tax if it had refrained from conducting religious "Crusades" in California.

It is no distinction that Ministries could raise the suggested charge for its literature to cover the amount of the tax. The Jehovah's Witnesses in *Murdock* could have done that too.

The practical impact of the tax here is much greater than in *Murdock*. Murdock owed $1.50 per day; Ministries owes over $118,000 for 52 days in California. The burden of calculating and collecting the sales and use tax is much greater than the burden of calculating the flat license fee in *Murdock*. The burden of allocating the use tax on mail order dissemination, among fifty states and to local governments with independent taxing authority or with extra rates appended to the basic state rate, is far greater than the burden of allocation in *Murdock*. In all sorts of ways, this tax compares unfavorably with the tax in *Murdock*. The method of calculation is a distinction without a difference.

Taxation of the magnitude at issue here does not mean just that each church has to pay a few extra dollars to the government. Some churches will not be able to pay. Some churches will have to eliminate religious programs; others will lose their property to tax foreclosure sales or be driven out of existence.

These problems are illustrated by *International Society for Krishna Consciousness v. Board of Equalization,* now pending in the California Court of Appeal (Notice of Redetermination No. SR AS 18-649831). The Board assessed $43,000 in back taxes on ISKCON's distribution of religious literature. When ISKCON sought to negotiate a payment plan, the Board conducted a probing audit of its financial records and demanded that it cut religious programs to free money to pay the contested taxes. The Board also recorded a tax lien on all the church's property. ISKCON was at risk of losing all its property, including tax exempt property used solely for religious purposes, because of its inability to pay the sales and use tax on its distribution of religious literature.

C. A Constitutional Tax Immunity in This Case Is Wholly Consistent With Texas Monthly v. Bullock.

The position urged here is wholly consistent with *Texas Monthly, Inc. v. Bullock,* 109 S. Ct. 890 (1989). *Texas Monthly* was this Court's first effort to grapple with the difficult problem of defining the boundaries of the constitutionally compelled tax immunities and permissible tax exemptions for religious exercise. A majority in *Texas Monthly* agreed that the discriminatory exemption there must be struck down, but it could not agree on the rationale. A different majority seemed to agree that the free exercise clause requires some kind of tax immunity for the dissemination of religious ideas. *See* 109 S. Ct. at 905-06 (Justices Blackmun & O'Connor, concurring); 109 S. Ct. at 913-14 (Justices Scalia & Kennedy, and the Chief Justice, dissenting).

At the heart of the problem in *Texas Monthly* was a deviation from content neutrality. The Texas statute did not merely distinguish religious speech from commercial speech. The Texas statute distinguished not-for-profit speech about religion, and about fundamental values, on the basis of the values expressed. These content distinctions went to the very core of the First Amendment. Christian literature was tax exempt, but atheist literature and secular humanist literature was taxed. Literature from churches was tax exempt, but a not-for-profit exposé of corruption or misconduct in churches would be taxed. Religious literature was tax exempt, but philosophical, ideological, and political literature would be taxed.

A majority agreed that the narrow boundaries of the exemption in *Texas Monthly* were forbidden, without being able to agree on boundaries that would be permitted. The three opinions constituting the majority suggested or implied several possible boundaries. *Id.* at 900 (Justices Brennan, Marshall, & Stevens); *id.* at 905 (Justice White); *id.* at 906-07 (Justices Blackmun & O'Connor). Unable to agree, and with the question of permissible boundaries not actually presented, the Court properly left it to Texas in the first instance to decide whether to redefine the boundaries of its exemption.

Texas Monthly does not hold that the state can tax the exercise of religion. Texas was not attempting to do so, and no religious organization was either a party, intervenor, or amicus in that case. The question whether churches are constitutionally entitled to tax immunity in some circumstances was simply not presented.

Here that question is presented. This case requires the Court to reaffirm and apply the principle that religious proselytizing cannot be taxed.

Like *Texas Monthly,* this case does not require the Court to define the precise boundaries of the constitutionally required immunity, or the perhaps broader boundaries of constitutionally permissible exemptions. *Texas Monthly* held only that an obviously discriminatory exemption is constitutionally forbidden; this case requires only the holding that *some* exemption is constitutionally required. The task of defining the precise boundaries of this exemption in a way most consistent with content neutrality must again be left to the states in the first instance, and to future litigation if necessary.

D. This Case Is Wholly Different from Hernandez v. Commissioner.

This Court recently held that a fixed and mandatory payment, made in exchange for religious services, is not a tax deductible charitable contribution. *Hernandez v. Commissioner,* 57 U.S.L.W. 4593 (June 5, 1989). *Hernandez* has a superficial resemblance to this case; both involve taxes and a charge for a thing of religious value. The similarity ends there.

The tax at issue in *Hernandez* was a tax on the secular income of a member of the church. Hernandez owed tax on his salary or some other indisputably secular income. He had received that income and incurred tax liability before the occurrence of any religious event at issue in the case. He then claimed a deduction, arising from his

religious activities, that would in effect have sheltered some of his secular income from tax.

Here the tax falls on the religious activity itself. The church owes tax because it distributed religious literature. Hernandez owed tax because he had secular income. Hernandez sought to reduce his tax because of religious activity; California seeks to impose a tax because of religious activity. Hernandez sought to pay less than the full cost of his religious activity, by recouping part of it through a tax deduction; California seeks to make churches pay more than the full cost of their religious activity, by adding the cost of a tax.

II. Tax Immunity for Dissemination of Religious Messages Does Not Establish Religion.

The rule that the state may not tax the exercise of religion does not itself establish religion. The state does not establish religion by leaving it alone.

A contrary view could arise only from a fundamental misconception of the establishment clause. The two religion clauses are not at war with each other, one pro-religion and one anti-religion. In the words of the Williamsburg Charter, a bicentennial document signed by prominent national leaders from a wide spectrum of political and religious perspectives, the two religion clauses are "mutually reinforcing provisions," "a brilliant construct in which both no establishment and free exercise serve the ends of religious liberty and freedom of conscience."

Together, the two clauses ensure government neutrality toward religion. *See, e.g., Wallace v. Jaffree*, 472 U.S. 38, 53 n.37, 60-61 (1985); *Thomas v. Review Board*, 450 U.S. 707, 717 (1981). They leave religion wholly to private choice, as uninfluenced by government as possible.

Tax immunity is the course most consistent with religious neutrality. Failure to tax the dissemination of religious literature will not encourage anyone to begin proselytizing who did not already desire to do so. Failure to tax proselytizing does not reduce the cost of proselytizing. But taxation does discourage proselytizing, by increasing the cost. The administrative burden of collecting and remitting use tax for thousands of separate jurisdictions escalates that cost prohibitively.

This Court has held that a tax exemption for property used exclusively for religious worship does not violate the establishment clause, at least if analogous subjects of taxation are also exempt. *Walz v. Tax Commission*, 397 U.S. 664 (1970). That holding was correct then and it is correct now. *Walz* and *Murdock* are twin cases, guaranteeing religious liberty under both religion clauses.

The constitutionally required neutrality is achieved by equal tax exemptions for all literature about religion, both pro and con. It is not achieved by equally burdening all exercises of religion. The argument that any exemption is prima facie an establishment leads to the absurd conclusion that churches should generally be taxed and regulated to the same extent as business corporations. But that would leave nothing of the free exercise clause. The exercise of religion is not free when it is taxed. The free exercise clause requires tax immunity, and nothing in the establishment clause forbids it.

Taxation of religion inevitably departs from neutrality in another way. Small and unpopular religions, the religions of minorities, are subject to disproportionate enforcement. Consider the litigants in the cases discussed in this brief. *Murdock* targeted the Jehovah's Witnesses; *Hernandez* targeted the Scientologists; the *ISKCON* case in California targeted the Hare Krishnas; and this case targeted Jimmy Swaggart Ministries. It is no accident that each of these religious groups has been the victim of widespread public hostility. *Walz* and *Texas Monthly* are not exceptions; those were not tax collection suits, but abstract litigations in which no religious organization was represented. As is so often true, the assault on civil liberties begins with the marginal groups in our society. This assault may eventually reach mainstream groups as well, but enforcement will never be even-handed.

CONCLUSION

The National Council of Churches urges the Court to reaffirm the long-standing rule that the dissemination of religious literature cannot be taxed. This rule is central to the free exercise of religion, and of great practical importance to all members of the Council.

The judgment below should be reversed.

Respectfully submitted,

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